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In the Supreme Court of the United States

OCTOBER TERM, 1983

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
PETITIONER

v.

ESTHER WUNNICKE
~~ROBERT LERESCHE~~, COMMISSIONER OF DEPARTMENT OF NATURAL RESOURCES OF THE STATE OF ALASKA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PETITIONER

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Acting Assistant Attorney General

DIRK D. SNEL
BLAKE A. WATSON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether federal statutes and regulations restricting the export of unprocessed timber cut from federally-owned land constitute congressional consent to an Alaskan statute imposing similar export restrictions on unprocessed state-owned timber.

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This brief is filed in response to the Court's order of June 13, 1983, inviting the Solicitor General to express the views of the United States. We conclude that the petition presents a question of law of substantial importance, that it was wrongly decided by the court of appeals, and that certiorari should be granted to review that judgment.

STATEMENT

The State of Alaska, by statute, authorizes the State Commissioner of the Department of Natural Resources to condition the sale of state-owned timber

on "primary manufacture" within the State. Alaska Stat. § 38.05.115 (1982); Pet. App. 19a-21a. The primary manufacture condition, which requires that the timber undergo certain processing in Alaska prior to export, parallels various federal statutes and regulations which restrict the export of unprocessed timber cut from federally-owned land. Pursuant to authority granted by Congress in the Organic Administration Act of 1897, 16 U.S.C. 475, 551 (Pet. App. 22a-23a), the Secretary of Agriculture since 1928 has restricted the export of unprocessed timber from national forest lands in Alaska.[1] 36 C.F.R. 223.10(c) (Pet. App. 35a). Exportation of logs cut from federal lands located west of the 100th meridian (a line running from central North Dakota through central Texas) was also limited from 1969 to 1973 by a quota set by Congress. 16 U.S.C. 617. The quota was replaced in 1973 by a series of annual riders to appropriation acts which prohibit the Secretaries of Interior and Agriculture from using appropriated funds to export timber from federal lands west of the 100th meridian in the contiguous forty-eight states. See, *e.g.*, Pub. L. No. 96-126, Section 301, 93 Stat. 979 (Pet. App. 29a). See also 43 C.F.R. 5400.0-3(c) (Department of Interior regulation implementing export ban).

Congress, however, has passed no law generally restricting the sale of timber from state-owned land. When it legislated under the Export Administration Act of 1979, 50 U.S.C. App. (Supp. V) 2406(i)(1) (Pet. App. 28a-29a) to specifically restrict the export of unprocessed western red cedar logs from state

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[1] Exportation of privately-owned timber is also restricted to the extent such exports are made possible by the purchase of national forest timber. See 36 C.F.R. 223.10(a)(1), (4).

lands from 1979 to 1982 and ban their export thereafter, Alaska was specifically exempted from the restrictions and ban. See Pub. L. No. 96-126, Title III, Section 308, 93 Stat. 980 (1979) (Pet. App. 30a).

In 1980 the Commissioner of the Alaska Department of Natural Resources gave notice that a proposed sale of state timber would be conditioned on primary manufacture in Alaska. The condition was imposed in order to insure a continuing supply of timber for local processors during a period of temporary shortage of timber from federal lands. Pet. App. 2a-4a.

Petitioner, who does not own an operating mill in Alaska, brought the present action for injunctive relief in the United States District Court for the District of Alaska, asserting that the in-state primary manufacture requirement violates the Commerce Clause. U.S. Const. Art. I, § 8, Cl. 3. The district court granted petitioner's motion for summary judgment and issued a permanent injunction. Pet. App. 16a. The court found that the in-state processing requirement was not removed from Commerce Clause scrutiny by either congressional consent[2] or by the State's alleged status as a "market participant,"[3]

[2] The court found that, although Congress had authorized the imposition of export quotas on unprocessed timber from federal lands, "it has in no way expressly exempted state timber laws from commerce clause restrictions." Pet. App. 12a.

[3] The State, relying on *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976), and *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), argued that it acted in a proprietary capacity as a "market participant," rather than as a "market regulator," when it imposed the processing requirement as a condition on the sale of its timber. The district court found that the primary manufacture requirement "goes beyond the *Alexandria*

but instead constituted an impermissible burden on interstate commerce under the test set forth by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (Pet. App. 14a-16a).

The Ninth Circuit reversed, and, in doing so, professed to avoid the constitutional issue (Pet. App. 2a-7a). The court found "implicit approval of the Alaska statute under congressional statutes which impose similar conditions on the sale of timber from federal lands" (Pet. App. 2a). The express consent of Congress was held not to be a prerequisite for the validation of otherwise impermissible state commercial regulations (Pet. App. 5a):

> The rule acknowledging congressional power to approve otherwise impermissible state regulation of interstate commerce usually is applied in cases where Congress has expressly authorized such regulation, *see, e.g., Western & Southern Life Insurance Co.* v. *State Board of Equalization of California*, 451 U.S. 648 (1981). But such express authorization is not always necessary. There will be instances, like the case before us, where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests.

ARGUMENT

The court of appeals, in light of its finding that "Congress has acted to validate the state policy" (Pet. App. 5a), did not review either the applicability of the *Alexandria Scrap* exemption or the district

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Scrap exemption" (Pet. App. 14a), noting that "[h]ere the State is restricting the flow of a state-owned nature resource rather than a state-owned man-made commodity" (Pet. App. 13a).

court's conclusion that the primary manufacture requirement constitutes an unconstitutional burden on commerce under the test set forth in *Pike* v. *Bruce Church, Inc., supra.* We likewise do not address these questions here, since this Court may deem it appropriate to remand the case to the court below for its consideration of the constitutional issues. But we join petitioner in urging the Court to review and reverse the holding that Congress has implicitly authorized Alaska's in-state processing requirement.

1. The court of appeals' holding (Pet. App. 5a) that express congressional authorization "is not always necessary" in order to validate an otherwise impermissible state regulation of interstate commerce conflicts with a consistent line of decisions of this Court. When Congress has exercised its "undoubted power to redefine the distribution of power over interstate commerce" (*Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945)), it has always done so expressly. See, *e.g.*, *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648, 654 (1981) (Congress "explicitly intended" the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, to authorize state taxing and regulatory powers over the insurance business); *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 427 (1946) (state tax on foreign insurance companies upheld in view of "positive expression" in the McCarran Act); and *Whitfield* v. *Ohio*, 297 U.S. 431, 438-439 (1936) (Hawes-Cooper Act, 49 U.S.C. 60, expressly removed restrictions on state regulatory power over convict-made goods shipped in original packages in interstate commerce). Most recently, in *White* v. *Massachusetts Council of Construction Employers, Inc.*, No. 81-1003 (Feb. 28, 1983), the Court upheld a "local hire"

executive order issued by the Mayor of Boston, Massachusetts, insofar as it was applied to projects supported in part with funds from federal programs, only because it was found to be "*affirmatively sanctioned* by the pertinent regulations of those programs," and thus exempt from the restraints of the Commerce Clause. *White, supra*, slip op. 11 (emphasis added).

The requirement that Congress expressly consent to otherwise unconstitutional state restraints on interstate commerce is confirmed by recent decisions invalidating state laws when congressional authorization was lacking. In *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), this Court rejected the contention that a Florida law prohibiting out-of-state bank holding companies from acquiring local investment subsidiaries was authorized by Sections 3(d) and 7 of the Bank Holding Company Act of 1956, 12 U.S.C. 1842(d), 1846, finding "nothing in [the Act's] language or legislative history to support the contention * * *." 447 U.S. at 49. In *Sporhase* v. *Nebraska ex rel. Douglas*, No. 81-613 (July 2, 1982), Congress was found not to have consented, in various federal statutes which defer to state water law, to a Nebraska statute restricting the export of groundwater from the state.[4] Finally, in *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982), the Court declined to read Section 201(b) of the Federal Power Act, 16 U.S.C. (Supp. V) 824(b), as giving congressional consent to a New Hampshire statute prohibiting the exportation of

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[4] This Court noted that in each prior instance where congressional consent was found in a federal statute, it was "expressly stated." Slip op. 18.

hydroelectric energy produced within its borders by a federally licensed facility:

> [W]hen Congress has not "expressly stated its intent and policy" to sustain state legislation from attack under the Commerce Clause, *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427, 431 (1946), we have no authority to rewrite its legislation based on mere speculation as to what Congress "probably had in mind." See *United States* v. *Public Utilities Comm'n of California*, 345 U.S., at 319 (Jackson, J., concurring); see also *id.*, at 311.

The unprecedented "implicit approval" theory of the court of appeals directly conflicts with the holding in *New England Power Co.* set forth above. This approach invites the courts to resort to "mere speculation" in order to determine whether Congress, in enacting a statute regulating commerce, tacitly authorized states to impose parallel and otherwise impermissible burdens on interstate commerce. The uncertainties inherent in the application of the "implicit approval" theory are illustrated in the case at hand. First, determining when a "parallel policy" exists is far more difficult than the court of appeals' opinion indicates. Any number of federal laws could be interpreted as establishing a "policy" on a particular matter and the inferences to be drawn might well be inconsistent. For instance, although the court relied on statutes regulating the shipment of timber from *federal* lands (693 F.2d at 893; Pet. App. 5a-7a), it failed to mention the only congressional statute dealing with timber shipped from *state* lands, which is what is at issue in this case. This latter statute restricted the export of unprocessed red cedar only, and excepts from even this limited restriction the

State of Alaska. See 50 U.S.C. App. (Supp. V) 2406(i)(1); Act of Nov. 27, 1979, Pub. L. No. 96-126, Section 308, 93 Stat. 980 (1979). Thus, it can be inferred that Congress *favors* the unrestricted export of all timbers except red cedars from state lands and *disapproves* any restrictions on timber export from the State of Alaska.

Second, even assuming *arguendo* that we should examine the statute regulating exports from federal lands for the relevant policy, it is not at all clear that the federal policy, taken alone, can support the Alaskan statute. The objective of the federal timber policy for national forest lands, as set forth in the Organic Administration Act of 1897, 16 U.S.C. 475 (Pet. App. 22a), is to secure "favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." The purpose of the Alaskan statute, however, is to protect in-state manufacturers as well as to secure a continuous supply. See Excerpt of Record in Court of Appeals at 73. It may well be that the federal lands restriction fully satisfies the congressional concern to assure a continuous supply of timber for the United States, while the state statute continues to operate in pursuit of a protectionist aim that Congress did not endorse. This illustrates the difficulty courts will have in ascertaining whether an ostensibly "parallel" state statute is pursuing independent policy goals under the cloak of a federal statute whose policy goals have already been fulfilled.

What is more, the requirement of express congressional consent to otherwise invalid state laws is not grounded solely on a desire to avoid judicial speculation. It also implements the constitutional alloca-

tion of power over the regulation of commerce. From the earliest days of the Republic, this Court saw the danger to the Nation's economy if state legislatures, in which local interests alone were represented, were free to pass statutes that discriminated against interstate commerce. See *McCulloch* v. *Maryland*, 17 U.S. [4 Wheat.] 316 (1819). Later, the Court extended this reasoning and struck down under the Commerce Clause statutes that discriminated against unrepresented out-of-state interests. See *Robbins* v. *Shelby County Taxing District*, 120 U.S. 489, 499 (1887). See also *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46 n.2 (1940). The requirement of explicit congressional approval for discriminating state statutes is a necessary corollary to the proposition that the Commerce Clause is designed to protect unrepresented interests from parochial discrimination. See, generally, J. Ely, *Democracy and Distrust* 83-84 (1980). It assures that the national legislative process will afford the representatives of the burdened interests a clear opportunity to voice their views. Cf. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism*, 89 HARV. L. REV. 682, 695 (1976). The "implicit approval" theory on the other hand strips away this opportunity from the national representatives of the burdened interests and gives the initiative instead to state legislatures. The net effect of the theory is therefore to make it harder to check "the tendencies toward Economic Balkanization" (*Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979)), which the Commerce Clause is designed to prevent.

2. The decision of the court of appeals is of substantial importance to the timber industry and, more-

over, implicates the commercial relations of the United States with other nations. In addition to Alaska, three other states within the Ninth Circuit —California, Oregon, and Idaho—restrict the export of unprocessed timber.[5] Because most of the timber exported from these states is purchased by Japan,[6] the primary impact of these state statutes falls on foreign commerce. Foreign purchasers of American state-owned timber must thus abide by different regulations depending upon where the timber is located. The result is state interference with foreign commerce, which is, of course, "preeminently a matter of national concern." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979).

It is evident that the "implicit approval" theory, if accepted, would have a far-reaching effect on the federal government's power over foreign commerce. Under the theory of implied congressional consent, states would be free to enact non-uniform and otherwise impermissible state burdens on interstate and foreign commerce without any focused consideration and decision by the national legislature. In our view, that doctrine carries too great a risk that the foreign relations of the United States will be adversely affected by an unintended re-allocation of the

[5] See Pet. 14 and Pet. App. 36a-38a.

[6] As noted by petitioner (Pet. 3 n.2), Japan, in 1980, purchased 90% of the $1.4 billion of unprocessed logs exported from Washington, Oregon, Alaska and California. F. Ruderman, *Production, Prices, Employment and Trade in Northwest Forest Industries, Second Quarter 1982* at 19 (U.S. Forest Service 1982). The State of Washington, which does not have an in-state processing statute, received $1.034 billion of the $1.4 billion total. Ruderman, *supra*, at 17-19.

commerce power that the Constitution placed in the keeping of Congress.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the United States Court of Appeals for the Ninth Circuit should be vacated, and the case should be remanded for further proceedings to resolve the Commerce Clause issues which were not addressed by the court of appeals.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Acting Assistant Attorney General

DIRK D. SNEL
BLAKE A. WATSON
Attorneys

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